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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/051,846	01/17/2002	David Myatt Parker	C70334D1	3355

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10/08/2002

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EXAMINER

KWON, BRIAN YONG S

ART UNIT	PAPER NUMBER
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1614

DATE MAILED: 10/08/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/051,846

Applicant(s)

PARKER, DAVID MYATT

Examiner

Brian S Kwon

Art Unit

1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 January 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13, 22, 26 and 27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13, 22, 26 and 27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☒ Certified copies of the priority documents have been received in Application No. 09/485,898.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Status of Application

1. This application has been filed as a (voluntary) divisional application of 09/485,898 filed 02/17/2000, now patented US 6,383,473 B1, which is a 371 of PCT/EP98/05119 filed 08/11/1998.
2. Receipt of amendment filed January 17, 2002 is acknowledged. Claims 14 to 21 and 23 to 25 have been cancelled; claims 1, 4-9, 11, 13 and 22 have been amended; and claims 26 and 27 have been amended. Claims 1-13, 22, 26 and 27 are currently pending.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

3. Claims 1-13, 22, 26 and 27 are rejected under 35 U.S.C. 102(e) as being anticipated by De Willie et al. (US 5597595).

De Wille teaches a powered beverage concentrate comprising calcium compound (i.e., calcium glycerophosphate) and an acid (i.e., citric acid and lactic acid), wherein calcium to acid molar ratios is about 0.5 in Example 7 (i.e., $\text{Ca:acid molar ratio} = 1.388 / 2.692 = 0.51$ (without ascorbic acid); $\text{Ca:acid molar ratio} = 1.388 / 2.952 = 0.47$ (including ascorbic acid)). The reference also teaches that the pH of liquid beverage concentrate (prepared by mixing water with a powered beverage concentrate) is in the range of about 2.8 to 4.6.

Since the instant specification defines that the term effective pH means the pH of the composition before solidification (where the composition is prepared via a liquid phase intermediate) or the pH of the composition when reconstituted or dissolved in a liquid, e.g., water (page 2, lines 26-29), the referenced pH of liquid beverage concentrate which is prepared by mixing water with the powered beverage concentrate having the claimed calcium to acid molar ratio in Example 7 “meets” the claimed limitation of “the effective pH of the solid or semi-solid composition is from 3.5 to 4.5. Therefore, the reference clearly anticipates the claimed invention.

As to the claim limitations of claims 2-4 and 26-27, the referenced calcium and acid molar ratios of either 0.47 or 0.51 clearly anticipates the claimed range of 0.3-0.6 (calcium: acid) in claim 2 and 26; the claimed range of 0.3-0.55 (calcium: acid) in claim 3 and 27; the claimed “at least 0.4” (calcium: acid) in claim 4.

As to the claim limitations of claims 5-6, the referenced pH range of 2.8 to 4.6 clearly anticipates the claimed pH of “not more than 4” in claim 5 and the claimed pH of 3.7 to 3.9 in claim 6.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
4. Claims 1-13, 22, 26 and 27 rejected under 35 U.S.C. 103(a) as being unpatentable over Burkes et al. (US 5445837).

Burk teaches or suggests a dry sweetener supplement composition comprising calcium compound and the acidulant (i.e., citric acid and malic acid), wherein the molar ratio of calcium to acid is about 0.8. The reference also teaches or suggests the effective pH of said composition less than equal to about 3.8 (column 9, lines 39-44), wherein pH is about 3.7 in dry powder form (column 12, lines 32-34).

The teaching of Burkes differs from the claimed invention in the specific molar ratio of calcium to acid. However, the optimization of amounts of known active and inactive ingredients in a composition is well considered within the skill of the artisan, and the artisan would be

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~~motivated to determine optimum amounts to improve the stability of calcium citrate malate in a~~
composition.

Conclusion

5. No Claim is allowed.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian Kwon whose telephone number is (703)308-5377. The examiner can normally be reached Tuesday through Friday from 9:00 am to 7:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marianne Seidel, can be reached on (703) 308-4725. The fax number for this Group is (703) 308-4556.

Any inquiry of a general nature of relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.

Brian Kwon

**ZOHREH FAY
PRIMARY EXAMINER
GROUP 1600**

